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**Supreme Court of the United States**

OCTOBER TERM, 1979

No. **78-1731**

STATE OF NEW MEXICO and JAMES R. BACA,  
Director, Department of Alcoholic Beverage Control,  
*Petitioners,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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v.

UNITED STATES OF AMERICA,  
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### PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The State of New Mexico and its Director of the Department of Alcoholic Beverage Control petition for a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit in this case.

#### OPINIONS BELOW

The Judgment entered in this case by the United States District Court for the District of New Mexico on January 31, 1977 (App. A, pp. 1a-2a) is unreported. The District Court's Findings of Fact and Conclusions of Law of January 31, 1977 (App. B, pp. 3a-8a), and Opinion letter of December 16, 1976 (App. C, pp. 9a-10a), are also unreported. The Opinion of the United States Court

of Appeals for the Tenth Circuit (App. D, pp. 11a-22a) is reported at 590 F.2d 323 (1978).

### JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit were entered on December 18, 1978. By order of March 12, 1979, Mr. Justice White extended the time within which to file a Petition for a Writ of Certiorari to and including May 17, 1979 (App. E, p. 23a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

### QUESTIONS PRESENTED

28 U.S.C. § 1161 provides that the criminal sections of the statute's title shall not apply to any act or transaction within any area of Indian country "provided such act or transaction is *in conformity both with the laws of the State in which such act or transaction occurs*" and with a duly-adopted tribal ordinance, certified by the Secretary of the Interior and published in the Federal Register (emphasis added).

1. Whether 18 U.S.C. § 1161 applies all State laws, including a State licensing requirement, to liquor transactions in Indian country.

2. Whether 18 U.S.C. § 1161 authorizes State enforcement of its laws with respect to liquor transactions in Indian country.

3. Whether an Indian-operated resort, under 18 U.S.C. § 1161 and the Twenty-First Amendment to the Constitution, is entitled to immunize itself and the persons with whom it deals from criminal penalties when that resort caters almost exclusively to non-Indians, at least half of its employees are non-Indian, the resort is a nationally and internationally known tourist attraction competing

with non-Indian establishments not only for the liquor trade but for a variety of sports-related and convention activities, and the liquor bought by the resort is sent into the State through normal commercial channels, comes to rest outside Indian country, and is resold to the Indian-operated resort by regular commercial wholesalers.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1161 provides:

The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country *provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs* and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register. [Emphasis added.]

Material portions of other pertinent constitutional and statutory provisions are included in Appendices I and J, pp. 33a-60a.

### STATEMENT OF THE CASE

#### A. The Factual Background

This case involves the unlicensed sale of liquor at the Inn of the Mountain Gods located on the Mescalero Apache Indian Reservation in south central New Mexico. The Inn of the Mountain Gods is a spacious, deluxe, tourist resort complex featuring a luxurious hotel, a stocked lake for fishing, boating and water sports, a golf course, pro shop, tennis facilities, swimming pool, trap and skeet shooting range, a stables complex, paddle tennis

courts, restaurants, liquor lounges, and convention facilities (R. Vol. II, pp. 14-15, 37, 39, 54-55).<sup>1</sup> The Inn of the Mountain Gods is owned and operated by the Mescalero Apache Tribe as part of a tourism program established by the tribe to attract non-Indians to the Mescalero Apache Reservation as well as to the Sierra Blanca Ski Resort, which is a tribal commercial enterprise located adjacent to the reservation (R. Vol. II, pp. 19-20, 23, 49). In connection with the operation of the Inn of the Mountain Gods, the Mescalero Apache Tribe also maintains a hunting and fishing business, including "package" hunts of big game animals, and a camping and picnicking program. "Package" hunts of big game animals include hunting fees, lodging at the Inn, guide service, and various other hunter needs (R. Vol. II, p. 23). The Inn of the Mountain Gods caters almost exclusively to non-Indian patrons from across the country. At least 97% of the guests at the Inn of the Mountain Gods are non-Indians from off the reservation, and at least 50% of its employees are non-Indian, including the general manager and the bar manager (R. Vol. II, pp. 36, 42; see *Mescalero Apache Tribe v. State of New Mexico*, United States Court of Appeals, Tenth Circuit No. 78-1790, appeal pending). The Inn's liquor is supplied by off-reservation, non-Indian New Mexico wholesalers.

The Inn of the Mountain Gods is a \$15,000,000.00 plus, completely federally financed, facility which is a nationally and internationally competitive tourist attraction (R. Vol. II, pp. 14-15, 29-30, 54-55). The Inn is expected to gross in excess of \$90,000,000 in the twenty-year depreciation period of the facility (R. Vol. II, pp. 53-54). It is the largest and most spectacular tourism project to be built by the federal government on Indian land anywhere in the country (R. Vol. II, pp. 54-55, 61).

<sup>1</sup> "R. Vol." refers to a particular volume of the record as printed and filed in the Tenth Circuit.

Events surrounding the opening of the Inn of the Mountain Gods without a State liquor license in July of 1975 occasioned this jurisdictional conflict. The introduction, possession and sale of intoxicating beverages had been approved by the Mescalero Apache Tribe by an ordinance adopted in 1965 in order to allow liquor for its members and to promote tourism on the reservation (R. Vol. II, pp. 9-10, 12). The Mescalero Apache tribal liquor ordinance expressly provides that the introduction, possession or sale of intoxicating beverages within the Mescalero Apache Reservation would be lawful if done in conformity with the laws of the State of New Mexico (App. F, pp. 24a-25a). At the time the Inn of the Mountain Gods opened, there was pending for approval before the Director of the Department of Alcoholic Beverage Control a proposal to transfer to the Inn a tribally-owned license from another location on the reservation (R. Vol. II, p. 62). This transfer was later administratively denied, and the Mescalero Apache Tribe did not pursue available judicial review of the decision. The number of liquor licenses which may be issued under New Mexico law is limited by population and geographic area (App. I, pp. 38a-39a). Under these statutory quotas, no new license could have been issued at that time for the Inn of the Mountain Gods (R. Vol. II, pp. 21, 67). State liquor licenses may, however, be purchased or leased. Purchase of such a license would have cost approximately \$50,000.00, the market price for licenses in the area (R. Vol. I, p. 164). Lease of such a license would have ranged between \$1,000 to \$1,200 a month (R. Vol. II, p. 70). The Mescalero Apache Tribe chose neither to buy nor lease the requisite license. Instead, it simply opened and began buying and dispensing intoxicating liquors. Acting on the advice of the Attorney General of New Mexico, the Director of the Department of Alcoholic Beverage Control ordered all State licensed liquor wholesalers to cease supplying the unlicensed tribal facility (App. G, pp. 26a-27a; R. Vol. I, p. 182).

The Mescalero Apache Reservation, which includes two other tribal liquor operations in addition to the Inn of the Mountain Gods (R. Vol. II, p. 63), is one of 26 Indian reservations and pueblos located within the State of New Mexico. These 26 Indian enclaves comprise 7,348,563 acres or 11,482 square miles. As of the present time, 10 of these Indian jurisdictions have enacted ordinances permitting the introduction, possession and sale of intoxicating beverages within their boundaries (App. H, pp. 28a-32a). Each of these other several Indian enclaves in New Mexico may likewise become a haven for non-Indian activity free of State law on the model of the Mescalero Apache enterprise.

On a larger scale, there are presently 104 tribes or reservations in 20 States which have passed ordinances pursuant to 18 U.S.C. § 1161 to permit the introduction, possession and sale of liquor within their boundaries (*id.*). If the decision below stands, these Indian jurisdictions will in all likelihood adopt the Mescalero model of tribal ownership and operation of liquor facilities in an attempt to free their tribal members and their largely non-Indian patrons from the requirements of State law and to avail themselves of the accompanying competitive advantages. See *Rehner v. Rice*, United States Court of Appeals, Ninth Circuit No. 77-2409, appeal pending.<sup>2</sup> Indeed, the Mescalero model is now being used widely with respect to other Indian enterprises, such as the big game or trophy hunting and fishing business, in an effort to immunize non-Indian sportsmen from State law for the commercial advantage of the Indian tribe. See, for example, *Confederated Tribes of Colville Indian Reservation v. State of Washington*, 591 F.2d 89 (9th Cir. 1979); *Mescalero Apache Tribe v. State of New*

<sup>2</sup> In this case, the District Court upheld under Section 1161 the authority of the State of California to require a Pala Indian operating a store on the Pala Reservation to obtain a State liquor license in order to sell distilled spirits.

*Mexico, supra*; *White Mountain Apache Tribe v. State of Arizona*, United States Court of Appeals, Ninth Circuit No. 78-3427, appeal pending; *State of North Carolina Dept. of Nat. and Econ. Resources v. Eastern Band of Cherokee Indians*, pet. for writ of certiorari to Fourth Circuit pending, No. 78-1653.

#### B. Proceedings in the Courts Below

Invoking the jurisdiction of the United States District Court under 28 U.S.C. § 1345, the United States, on behalf of the Mescalero Apache Tribe, brought this action against the State of New Mexico and its Director of the Department of Alcoholic Beverage Control, seeking a declaration that the Mescalero Apache Tribe has sole authority to license and regulate the sale of liquor at tribally operated commercial facilities located within the Mescalero Apache Reservation. The United States likewise sought preliminary and permanent injunctive relief enjoining the State of New Mexico from enforcing State laws concerning the licensing and regulation of the sale of liquor by the Mescalero Apache Tribe on the Mescalero Apache Reservation and, in addition, enjoining the State of New Mexico from taking any action against wholesale liquor suppliers which would result in a cessation of liquor supply to the tribally operated facilities (R. Vol. I, pp. 9-10).

The District Court ruled that 18 U.S.C. § 1161 delegates to the Mescalero Apache Tribe the sole authority to license and regulate the sale of alcoholic beverages at tribally operated facilities within the Mescalero Apache Reservation, so long as the Secretary of the Interior has certified a duly-adopted ordinance by the tribe, and that the federal statute does not require the tribe to obtain a State liquor license. The court further declared that the State of New Mexico has no authority to enter the Mescalero Apache Reservation to enforce State liquor

laws against tribally operated facilities, nor may it take any action against wholesale liquor suppliers that would result in the cessation of liquor supply to the tribally operated facilities. The court determined that the federal government had preempted State regulation, so that the State had no authority even under the Twenty-First Amendment to enforce its liquor laws with reference to the Mescalero Apache tribal liquor operations (R. Vol. I, pp. 159-166).

The United States Court of Appeals for the Tenth Circuit affirmed, holding that 18 U.S.C. § 1161 was not "... designed to grant licensing and regulation of liquor on tribal lands to the State of New Mexico" (App. D, p. 16a). While the Congress may delegate regulatory power in Indian country to the States, any such delegation "... must be in specific terms." According to the court below, Section 1161 does not delegate this authority either expressly or impliedly (App. D, p. 10a), and the State of New Mexico therefore cannot in any way participate in, or interfere with, the process by which the Mescalero Apache Tribe obtains or dispenses alcoholic beverages on its reservation.

#### REASONS FOR GRANTING THE PETITION

1. The primary issue in this litigation is whether and to what extent 18 U.S.C. § 1161 applies State liquor laws to liquor transactions occurring in Indian country, and how the application of these laws is to be enforced if they do apply. The first inquiry, then, is whether all State liquor laws, including the licensing requirement, apply to such transactions.

The courts below, surprisingly, said no. The District Court declared that no compliance in any measure with State law is required by Section 1161 with respect to liquor transactions occurring at tribally operated premises

within Indian country. The Tenth Circuit went further and held not only that the State could not enforce its liquor laws but that no compliance in any measure with State licensing procedures is required by Section 1161 with respect to liquor transactions *occurring anywhere in Indian country*, tribal premises or not. Even the United States did not advocate such an extreme construction of the statute in the proceedings below.

The Tenth Circuit's determination in this regard is based upon its conclusion that, despite Section 1161, the States have not been delegated regulatory authority over liquor traffic on Indian reservations. This conclusion misses the issue. The initial question again is simply whether, by virtue of Section 1161, State liquor laws apply to liquor transactions within Indian country, not whether such laws are to be enforced by the States if they do apply. That comes next. If State liquor laws do apply to such transactions, as the language of the statute clearly shows they do, then the unlicensed sale of liquor or any other departure from State liquor laws within Indian country is, at the very least, a violation of federal law. *United States v. Mazurie*, 419 U.S. 544 (1975). Whether it also gives the State and the tribe a basis to prosecute or to otherwise act is a separate question.

That all State liquor laws, including the licensing requirement, must apply to any liquor transaction anywhere in Indian country is evident from the language of the statute and is an inescapable conclusion from this Court's decision in *United States v. Mazurie*, *supra*. Section 1161 provides in pertinent part:

The provisions of Sections 1154, 1156, 3113, 3488, and 3618 of this title, shall not apply . . . to any act or transaction within any area of Indian country *provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly*

adopted by the tribe having jurisdiction over such area of Indian country. . . . [Emphasis added.]

By its terms, Section 1161 exempts from federal criminal penalty "any act or transaction" involving liquor within Indian country which "is in conformity *both* with the laws of the State" and "with . . . [a tribal] ordinance" (emphasis added). There is no limitation in the statute as to which State laws apply to liquor transactions in Indian country—all State laws apply, including the licensing provision. Nor does the statute say that State laws apply to liquor transactions in Indian country only if enforcement jurisdiction has likewise been delegated to the State by congressional action. Neither is there any indication that liquor transactions occurring at a tribally operated facility within Indian country are exempt from federal criminal penalty whether or not they conform with State law.

Indeed, in the *Mazurie* case, the introduction of liquor into Indian country without the tribal license required by the pertinent tribal ordinance was a sufficient basis for a federal criminal prosecution under Section 1154. The license requirement of the tribal ordinance was applicable to the transaction by virtue of Section 1161. The standard of conformity in Section 1161 as imposed in the *Mazurie* case with respect to a tribal ordinance must be the standard to be met with respect to State law as well, since the language imposing the standard is the same in either instance. The departure from the standard of conformity in the *Mazurie* case was a violation of federal law. Similarly, a departure from the requirements of State law would, at the very least, likewise be a violation of federal law subject to prosecution by the United States.

The conclusion that all State laws apply to liquor transactions occurring anywhere in Indian country by virtue of Section 1161 is also compelled by this Court's

decision in *California v. United States*, 438 U.S. 645 (1978). In that case, the United States attempted to impound water from a California river. The California State Water Resources Control Board ruled that the water could not be allocated to the United States under State law unless the United States agreed to and complied with various conditions dealing with the water use. Despite a provision in Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, to the effect that the Secretary of the Interior "shall proceed in conformity with such [State] laws . . .," the United States claimed that it could either ignore State law or make a pro forma application for State approval and then proceed regardless of the State ruling. This Court rejected these arguments and held that Congress intended for the Secretary to comply with the substance as well as the form of State law, and the Secretary was absolutely bound by State requirements.<sup>3</sup> The same reasoning applies here.

Despite the seemingly clear language of Section 1161,<sup>4</sup> as well as the direction of this Court's decisions in *United States v. Mazurie*, *supra*, and *California v. United States*, *supra*, the Tenth Circuit completely excluded State law from any application to any liquor transaction in any area of Indian country. State law simply has no part in the picture. This decision on the part of the Tenth Circuit would preclude even a federal prosecution under Sections

<sup>3</sup> In *California*, unlike the instant case, Congress passed subsequent legislation giving new directives to the Secretary but providing that the Secretary should follow State law *unless* it was in conflict with the new directives. The case therefore had to be remanded on the issue of inconsistency. No such new legislation, and therefore no such issue of inconsistency, is involved here.

<sup>4</sup> This Court has recognized this lack of ambiguity by stating, ". . . the sale of liquor on reservations has been permitted *subject to state law*, or consent of the tribe itself." *Organized Village of Kake v. Egan*, 369 U.S. 60, 74 (1962).

1154 or 1156 for failure to comply with State law.<sup>5</sup> The Tenth Circuit's opinion frees not only the Mescaleros but also the Mazuries and everyone else from the need to conform to State law when engaging in liquor transactions on Indian lands anywhere in this country. This extreme and, we submit, erroneous construction of Section 1161 alone warrants this Court's review in this case. As will be seen below, there are other compelling reasons as well.

2. Aside from the issue raised by the construction of Section 1161 in the courts below, the decision of the Tenth Circuit departs from the intent of Congress, which was to permit the States to enforce their own laws with respect to liquor transactions occurring within their territorial boundaries.

If State law applies to liquor transactions in Indian country as Section 1161 would clearly seem to require, then how and by whom are these laws to be enforced? As we have seen, a failure to conform to the requirements of State law should be considered, at the very least, a violation of federal law subject to prosecution by the United States. Do the States have a role in enforcing their own laws with respect to such transactions? The Tenth Circuit said no, concluding that delegation of regulatory authority to the States to enforce their laws with respect to liquor transactions in Indian country had to be spelled out in explicit and definitive terms. Section 1161 is not clear enough in this regard to satisfy the Tenth Circuit.

As a result of the decisions below, the 20 States in which the introduction, possession and sale of liquor in Indian country is now permissible, as well as the

<sup>5</sup> Indeed, the United States is permitting the Inn of the Mountain Gods to operate without conforming to the licensing requirement of State law.

States in which such introduction, possession and sale of liquor may hereafter become permissible, now have and will have nothing whatever to do with the procedure established in Section 1161 with respect to the application of State law to liquor transactions in Indian country. The States cannot license liquor transactions in Indian country; they cannot investigate alleged violations of, or enforce, their liquor laws; they cannot regulate in any way the delivery, possession, sale, service or consumption of liquor within Indian country; they cannot prosecute violations of their liquor control statutes. In other words, the States are to have no part whatever in determining whether, in fact, an act or transaction involving liquor in Indian country "is in conformity . . . with the laws of the State . . . ."

The complete ouster of the State regulatory and enforcement mechanism from any involvement in the control of liquor traffic within Indian country is simply not what Congress intended.<sup>6</sup> In the first place, as a practical mat-

<sup>6</sup> The Tenth Circuit describes Petitioners' legislative history showing as "particularly remote" (App. D, p. 21a). To the contrary, that history is very much to the point. Congressman Patten's original bill, which was limited to Arizona, provided in part that federal laws would not apply to any act or transaction off-reservation if the act or transaction was in conformity with State law, and would not apply to any act or transaction within a reservation if the act or transaction was in conformity with tribal law alone. H.R. 1055, Sections 2 and 3. (App. J, pp. 51a-53a). The Interior Department substitute, in language which was finally enacted and compiled as 18 U.S.C. § 1161, provided that various provisions of the federal law would not apply to an act or transaction involving liquor if the act or transaction was "in conformity both with" State laws and tribal ordinances. The Interior Department substitute combined Sections 2 and 3 of Congressman Patten's original bill and applied them to liquor in Indian country, precisely for the purpose of providing that every liquor transaction in Indian country be made subject to State law and, necessarily, State supervision and control.

Moreover, Section 3 of P.L. 83-277 (App. J, pp. 53a-54a) provided that New Mexico and Arizona *could*, but were not compelled to, amend their Constitutions to repeal prohibitions against the sale

ter, this result leaves the determination of whether transactions involving liquor in Indian country are, in fact, in conformity with State law entirely up to the United States, presumably in the person of the United States Attorney, no matter how the State may choose to interpret, apply and enforce its own laws in a given situation, and it leaves only a federal criminal prosecution under Sections 1154 or 1156 as the sole enforcement mechanism. These circumstances not only obviate effective and efficient control of liquor transactions within Indian country, but they even allow conflicting rules and policies to be applied—a situation which Congress could hardly have intended.<sup>71</sup> This is so, in part, because Section 1161 does not automatically assimilate State and tribal law as federal criminal offenses. There cannot be a federal criminal prosecution under Section 1161, for example, for selling liquor to a minor within Indian land, a State law offense. Instead, if there is a violation of State or tribal law, either Section 1154 or Section 1156 of 18 U.S.C. is applicable. However, there is no guarantee that the United States Attorney will read State law as a State prosecutor would read it, or, even if he did, that he would choose to prosecute the same violations that the State itself would deem important. Thus, serving beer to a minor, remaining open after hours, or refilling bottles may be considered too trivial for prosecution by federal

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of liquor in Indian country. These were included at Congress' command in the Enabling Act for New Mexico and Arizona, Act of June 10, 1910, 36 Stat. 557. Had Congress construed 18 U.S.C. § 1161, enacted as Section 2 of P.L. 83-277, as permitting Indian tribes to operate liquor outlets free of State supervision and control, Section 3 of P.L. 83-277 and the Enabling Act would have been redundant.

<sup>71</sup> Indeed, in this case, contrary to the position of the State of New Mexico, the United States has chosen to ignore the State licensing requirement and has encouraged the Mescalero Apache Tribe to depart, rather than preventing the tribe from departing, from State law requirements.

authorities but might well be treated as serious matters in the context of a State's overall attempt to supervise and enforce the proper sale of liquor within its borders (see App. I).

At any rate, according to the Tenth Circuit, it is entirely up to the United States to decide what to do in these cases, regardless of State policy.<sup>8</sup> On the other hand, if the State regulatory and enforcement apparatus were applied, as Congress intended, then disciplinary action appropriate to the offense could be brought at least against the licensee.

In the second place, 18 U.S.C. § 1161 does not expressly exclude any State laws from applicability to liquor transactions occurring within Indian country, including the licensing requirement. It makes little sense, however, to apply the licensing requirement except as a component part of a regulatory and enforcement apparatus by which the licensee is controlled in the operation of his liquor business. This overall apparatus, it is submitted, is exactly what Congress intended. See *United States v. Mazurie*, *supra*. The concern of Congress with the lack of federal enforcement effort with respect to liquor in Indian country suggests that it simply would not leave the application and enforcement of State law solely to the federal government. *Bryan v. Itasca County*, 426 U.S. 373 (1976); *State Legal Jurisdiction in Indian Country*, Hearings before the Subcommittee on Indian Affairs of the Interior and Insular Affairs Committee of

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<sup>8</sup> While the United States Attorney must, of course, find and apply State law in a secondary capacity in any number of situations, it is an entirely different matter to grant him complete and exclusive power to determine, apply and enforce State law in the first instance, occupying the combined powers of the Attorney General of the State and the State Supreme Court, without any possibility of deference to or control by proper State authorities. Such a result is not only demeaning to the State but obviously contrary to Congressional intent.

the House of Representatives on H.R. 459, H.R. 3235 and H.R. 3624, 82nd Cong., 2nd Sess. at 7-9 (1953).

This petition is not the proper forum to debate the extent of State regulatory authority—whether, for example, it encompasses the full spectrum of authority from initial investigation to criminal prosecution for illegal acts.<sup>9</sup> Such argument is better left to a full development on the merits. For present purposes, it is enough that the decisions below completely exclude the States from any and all participation in a determination as to whether an Indian tribe or anyone else buying and selling liquor within Indian country is acting “in conformity . . . with the laws” of that State. Such a conclusion goes far beyond a matter of incorrect statutory construction. It is a blow to “States rights” in that term’s purest and best sense—the ability of a State to determine for itself the meaning, nature and extent of the law that, under our federal system, is to apply to activities within its borders.

3. The decisions below prohibit the States from enforcing the criminal provisions of their liquor laws even against non-Indian offenders within Indian country. The States, historically, have had jurisdiction over State criminal offenses committed on Indian lands when neither the accused nor the victim is an Indian. *United States v.*

<sup>9</sup> The Tenth Circuit commented, without further elucidation, that this case related to “liquor licensing” and therefore did not affect the State’s “criminal jurisdiction over the Indians . . .” (App. D, p. 22a). No explanation was given as to how the State could prosecute an alleged criminal violation of its liquor laws without a concomitant power to license, inspect, regulate, investigate, etc. Yet this Court and the Congress have repeatedly noted and decried the crime, violence, bootlegging, graft and corruption that often occur in areas adjacent to liquor outlets. *E.g., California v. LaRue*, 409 U.S. 109, 114-119 (1972) (see also concurring opinion of Mr. Justice Stewart, *id.* at 119); *Bryan v. Itasca County*, *supra*, 426 U.S. at 376; *State Legal Jurisdiction in Indian Country*, *supra*; see also generally *United States v. Mazurie*, *supra*.

*McBratney*, 184 U.S. 651 (1881); *Draper v. United States*, 164 U.S. 240 (1896); *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946). This jurisdiction derives from the general principle that “in the absence of a limiting treaty obligation or congressional enactment, each State had a right to exercise jurisdiction over Indian reservations within its boundaries.” *New York ex rel. Ray v. Martin*, *supra*, 326 U.S. at 499. This principle is rooted in the concept of federalism. There is nothing in the text or legislative history of Section 1161 which even remotely suggests that Congress intended a departure from this fundamental principle. On the contrary, the principle would clearly seem to be confirmed by the statute. Yet the courts below completely ignored, and thus in effect refuted, that principle.

The effect of the rulings below in this regard brings into sharp focus the facts of this case and the consequent compelling interest of the Petitioners and all other States with Indian lands in regaining the control over non-Indian activity within their boundaries that the decisions below have swept away.

In this case, while the Mescalero Apache Tribe may own and operate the deluxe Inn of the Mountain Gods, the overwhelming majority of the people involved in violating State law with respect to its operation are non-Indians. The vast majority of the patrons of the Inn of the Mountain Gods are non-Indians from across the country. At least half of the employees of the Inn, including the general manager and the bar manager, are non-Indians, and the entire liquor supply of the Inn comes from non-Indian off-reservation wholesalers. The high level of non-Indian involvement with this enterprise is not coincidental. Indeed, non-Indians are invited onto the reservation to do business at the commercial tourist resort of the Mescalero Apache Tribe with the alluring assurance that they need not obey State law within the

reservation. A concerted effort is made on the part of the Mescalero Apache Tribe to use its status in an attempt to immunize non-Indians from the requirements of State law and thus gain a competitive advantage in the operation of their tribal commercial facilities. The resort uses its nonlicensed sale of liquor to draw business away from off-reservation establishments that must conform to strict State liquor law requirements, and to aid in its competition in other areas as well, such as boating, golf, tennis, swimming, trap shooting, horseback riding, paddle tennis, food service, convention facilities and nearby skiing. The commercial hunting and fishing business, operated in conjunction with the Inn, is another enterprise of the tribe in which competitive advantage is sought with the assurance to sportsmen that bag limits, season dates, restrictions on taking particular species and various other State law limitations do not apply within the reservation.

The resort is intended to compete directly with non-Indian resorts, and, as a result of the patronage of non-Indians lured to the reservation with tribal assurance of freedom from State law, it does so on a highly successful and profitable basis. It is a nationally and internationally competitive tourist attraction.<sup>10</sup>

We submit that this non-Indian involvement in these tribal commercial activities was never intended by Congress to be exempted under 18 U.S.C. §1161 or any other statutory or constitutional provision. While Congress has historically attempted to protect Indian tribes within their own territory, going about their own internal affairs, Congress never intended that Indian tribes

<sup>10</sup> These commercial enterprises are not the only cause for alarm over the decisions below. Many other States with Indian lands will be concerned due to the large non-Indian populations residing in Indian country. See, for example, *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).

be allowed to use establishments on Indian lands, not subject to normal license requirements, as a ruse to attract non-Indians onto Indian land and to protect them from State law for the commercial advantage of the tribe. See *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481-483 (1976). Moreover, Congress has never extended protection from State law to non-Indians who venture onto Indian land to engage in commercial business activity with the tribe. Thus, in *Thomas v. Gay*, 169 U.S. 264 (1898), a State was allowed to tax non-Indian owned cattle grazing on Indian reservations, and, in *Moe v. Confederated Salish & Kootenai Tribes*, *supra*, a State was permitted to impose its cigarette sales tax on cigarettes sold to non-Indians at a commercial Indian enterprise on an Indian reservation. And see *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342 (1949).

The Mescalero Apache tribal ordinance pertaining to the introduction, possession and sale of liquor on the Mescalero Apache Reservation (App. F, pp. 24a-25a) does not contain any regulatory provisions controlling liquor traffic on the reservation. Even if it did, such regulations could not be enforced against non-Indians. *Oliphant v. Suquamish Indian Tribe*, *supra*. Nor does federal law contain any regulatory provisions controlling liquor transactions within Indian country. Consequently, if the decisions below stand, "... it is clear that wholesale violations of the law by ... [non-Indian employees and patrons of the Inn] will go virtually unchecked," *Moe v. Confederated Salish & Kootenai Tribes*, *supra*, 425 U.S. at 482, unless, of course, the United States Attorney is willing to take on the responsibility of the State Liquor Director. In this case, the decisions below have sanctioned, in addition, even off-reservation violations of State law by non-Indian liquor suppliers of the Inn of the Mountain Gods. Liquor which is imported or transported into the State of New Mexico for delivery or

use therein in the normal course of business is sold to unlicensed Indian facilities in clear violation of State law (App. I, pp. 34a-35a) and, thus, of the Twenty-First Amendment to the United States Constitution (App. J, p. 48a).

Just as a State, when it engages in the ordinary private business of selling liquor, becomes subject to the taxing power of the federal government, *Scuth Carolina v. United States*, 199 U.S. 473 (1905), so an Indian tribe, when it becomes a private entrepreneur doing business with the off-reservation world, subjects itself to the powers of the State licensing authority. The tourist resort complex principally involved in this case and every development like it on any Indian reservation in the United States make a mockery of the special treatment and exemptions carved out for Indians by the Congress throughout our history. These are Indians competing directly with non-Indians on a discriminatory basis in the general marketplace. Yet, under the opinions below, the State would be powerless to protect either itself and its own strict standards and procedures, or its citizens subject to this discriminatory competition. We submit that this could not, and never was, the intent of Congress in passing 18 U.S.C. § 1161.<sup>11</sup>

Finally, it should be noted that the position of the United States in this case is rather curious. In this litigation, the United States has argued that the State of New Mexico may not enforce the criminal provisions of its liquor laws against non-Indians on the Mescalero Apache Reservation. Ironically, however, in the case of *Mescalero Apache Tribe v. Bell*, United States District Court for the District of New Mexico, No. CIV-78-926C, in which the Mescalero Apache Tribe is seeking to require

<sup>11</sup> Even if the statute could possibly be interpreted to allow such conduct, it would violate the Twenty-First Amendment to the extent described in the text above.

the United States to enforce the New Mexico Motor Vehicle Code against non-Indians operating vehicles on the Mescalero Apache Reservation, the United States has taken the position that enforcement of the State Motor Vehicle Code is within the exclusive jurisdiction of the State of New Mexico when an offense is committed by a non-Indian within the reservation (App. K, pp. 61a-62a). This position is based upon a Memorandum dated March 21, 1979, from the Office of Legal Counsel to Deputy Attorney General Benjamin R. Civiletti in which the Department of Justice takes the position that the prosecution of all crimes and offenses in which there is not a plainly identifiable "victim," as in the case of most traffic offenses and liquor code violations, is within the exclusive jurisdiction of the States when the crime or offense is committed on Indian land by a non-Indian (App. K, pp. 61a-62a). Moreover, it is the opinion of the Department of Justice that where there is an identifiable Indian victim, or where the conduct in question poses an immediate and direct threat to Indian persons, property, or to specific tribal community interests, the jurisdiction of the State and federal governments in these cases is concurrent (App. K, pp. 61a-62a). These conclusions are based on the *McBratney* doctrine.

The only difference between the situation in *Mescalero Apache Tribe v. Bell* and this case is that, in this case, a federal statute supports, indeed mandates here, the position taken there.

**CONCLUSION**

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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